PRETRIAL AND TRIAL PROCEDURES

for matters before

JUDGE WALKER D. MILLER
UNITED STATES DISTRICT COURT
DISTRICT OF COLORADO

Courtroom 13, 9th Floor
Alfred A. Arraj United States Courthouse

Chambers A938, Ninth Floor
Alfred A. Arraj United States Courthouse
901 19th Street
Denver, CO 80294-3589

Telephone: (303)844-2468

"A judge rarely performs his job adequately unless the case before him is adequately presented."

Louis D. Brandeis

Effective: January 15, 2003

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1. GENERAL

These procedures should help all of us try or otherwise resolve your case efficiently and fairly. We appreciate your cooperation and courtesy in working with each other and this court to achieve those common goals. Matters of general application are:

1.1. Staff: My secretary is Jane Trexler at 303-844-2468. The courtroom deputy clerk is Kathy Preuitt-Parks at 303-335-2093. The official court reporter is Janet Morrissey at 303-893-2835. Please do not call the law clerks on procedural or scheduling matters.

1.2. Applicable Rules: These procedures supplement the Federal Rules of Civil and Criminal Procedure and the Local Rules for the United States District Court for the District of Colorado, effective April 15, 2002; they do not replace or override them.

1.3. Timing: Fed. R. Civ. P. 6 controls the computation of all time requirements in these procedures.

1.4. Settings: The magistrate judge assigned to your case will set the scheduling and pretrial conferences, as well as any appropriate status and settlement conferences. After the Pretrial Order is entered, my secretary will set the trial preparation conference and the trial. These are firm settings but subject to rescheduling in the event of unavoidable conflict. We will seek to reschedule as soon as practicable.

1.5. Place: Unless otherwise indicated by myself or staff, all conferences with me will be in Courtroom 13. Conferences with a magistrate judge will be in that magistrate judge's courtroom.

1.6. Days; Hours: Normally, all jury trials will commence on Monday. Trials lasting longer than one week may break for all or part of Friday. Unless otherwise indicated, the trial day will start at 9:00 a.m. and end at 4:45 p.m. with mid-morning, lunch and mid-afternoon breaks. On the first day of trial, counsel should be in the courtroom at least 30 minutes before the scheduled commencement of trial.

1.7. Courtroom Organization and Protocol: Plaintiff's table is closest to the jury box. There is one lectern in the courtroom from which all counsel should address the court, witnesses and jury. Counsel and their witnesses should be sensitive to use of the microphones. The courtroom deputy will hand all exhibits to the witness. We suggest you simply ask the witness to look at whatever the exhibit number is.

1.8. Transcripts: Transcripts of all proceedings may be ordered from the court reporter, or Charlotte Hoard in the clerk's office at 303-335-2100. If electronic recording is used, you may also order copies of the tapes at the current cost of $20.00 per tape (90 minutes). Requests for a daily copy should be made well in advance of the trial or hearing date.

2. TRIAL PREPARATION CONFERENCE

There will be a trial preparation conference approximately two weeks before commencement of trial. The final Pretrial Order will guide the course of this conference and, ultimately, the trial. You should comply with the following requirements or procedures, to the extent applicable to your case:

2.1. Mandatory Attendance: Counsel who will try the case and all unrepresented parties shall attend the conference.

2.2. Consultation and Cooperation of Counsel and any Pro Se Party: Responsible advocacy should avoid wasting time on matters not really at issue. Accordingly, counsel and *pro se* parties are directed to confer sufficiently in advance of the trial preparation conference to allow them to timely file the matters required in § 2.3 below. Counsel and *pro se* parties shall then make a good faith effort to reach agreement or stipulations on any revision of the final Pretrial Order, witness lists, the admissibility of exhibits and other evidence, jury instructions and a chronological listing of undisputed facts.

2.3. Required Submittals: The parties shall submit the following documents at the trial preparation conference or by any earlier designated deadline:

2.3.1. Any proposed amendment to final Pretrial Order.

2.3.2. Exhibit List and markings: Completed exhibit list in the form provided at § 4, indicating all exhibits for which there has been a stipulation of admissibility. Plaintiff's (or plaintiff's equivalent) exhibits are numbered; defendant's (or defendant's equivalent) exhibits shall be marked as provided in D.C.COLO.LCivR 56.1C.1. It is recommended that counsel offer into evidence his or her stipulated exhibits at the conclusion of the conference or at the beginning of trial. Note: Mark demonstrative exhibits even if not to be admitted.

2.3.3. Witness List: Completed witness list in the form provided at § 5, setting forth the names and address of each witness who will be called in your case in chief ("will call" witnesses), briefly describing the witness's testimony and your best estimate of the time required for examination. This list is the particular party's representation, upon which opposing parties and I may rely, that the listed witnesses will be present and available for testimony at trial. The same information should be provided for all witnesses who may be called ("may call" witnesses). Absent stipulation or a showing of the need to prevent manifest injustice witnesses not listed in the final Pretrial Order may not be added. The witness list shall indicate all witnesses whose testimony is to be presented by deposition.

2.3.4. Designation of Deposition Testimony: Submit the transcript of the deposition with those questions and answers designated by the plaintiff marked with yellow and those portions designated by the defendants marked in blue. Any testimony to which there is an objection shall be indicated with a bracket and the objecting party shall file a brief, seriatim listing of each objection and the reasons therefor.

2.3.5. Stipulated Facts: Submit a listing of relevant facts over which there is no genuine dispute. Each factual matter should be in a separately numbered paragraph and, to the extent practicable, in chronological order. These will be incorporated into a jury instruction. *See* §§ 8.3. and 9.3.

2.3.6. Jury Instructions and Verdict Forms: At least three days prior to the conference, each party shall submit (a) an original and one copy of proposed jury instructions and verdict forms which are sequentially numbered and contain the authority or source at the end of each proposed instruction; (b) a listing of each instruction, by number and subject matter, to which there has been a stipulation; and (c) brief written objections to any objectionable instruction proposed by the other party. The net result should be that there is either agreement or objection to each instruction proposed by a party. If feasible, rulings will be made on objections at the trial preparation conference. Instruction submittals shall include:

2.3.6.1. Introductory Instructions: Standard instructions on matters such as the nature of the case, elements of claims, stipulated facts, and jury duties will be given prior to opening statements. *See* attached instruction forms at §§ 8.1. to 8.4. (civil) and 9.1. to 9.4. (criminal).

2.3.6.2. Closing Instructions: These instructions shall be given after closing statements. These include standard instructions on matters such as evidence, damages and verdicts. *See* §§ 10.1. to 10.14.

2.3.6.3. Computer Disc: A 3.5 inch computer disc compatible with Word Perfect 9.0 for Windows for all instructions without authority or source. The font should be at least 12 pt, “arial”, or something comparable. The disc should be formatted so that all instructions are saved under one document and labeled to indicate the party submitting it.

2.3.7. Proposed Voir Dire: Submit an original and one copy of proposed voir dire. I will conduct the voir dire, but counsel may be given the opportunity to briefly question the jury.

2.3.8. Findings and Conclusion: If trial is to the court, submit proposed findings of fact (by separately numbered paragraphs in more or less chronological sequence) and conclusions of law.

2.3.9. Settlement: Submit a written statement of the likelihood of settlement and whether a further settlement or mediation conference with a magistrate judge is recommended.

2.4. Motions in Limine: File any motions in limine at least 7 days prior to the trial preparation conference to enable the opposing side to prepare an informed response. A motion should be limited to a single subject. The court will endeavor to rule at the trial preparation conference if all sides have had a fair opportunity to present argument.

2.5. Trial Brief: Concise trial briefs, which contain the authority the party believes most pertinent, are welcome and shall be filed at the trial preparation conference. The briefs should only briefly summarize facts which the party believes will be proved, including damages. Briefs should not exceed 10 pages except in extraordinary circumstances.

3. CHECKLIST FOR THE MORNING OF TRIAL

3.1. Witness and Exhibit Lists: Provide the courtroom clerk (Kathy Preuitt-Parks) three copies of updated witness and exhibit lists.

3.2. Exhibits: The original and copies of exhibits shall be organized and placed in notebooks as follows:

3.2.1. Prepare the following notebooks of exhibits: original containing all listed exhibits for the witness box; judge's book containing all exhibits (if trial to the court, include complete copies for law clerk); court reporter's book containing all copies; and jury copies containing only stipulated exhibits (see below).

3.2.2. Label each exhibit and place it behind a tabbed divider containing the exhibit designation.

3.2.3. If all exhibits will not easily fit in one book, each party shall use different colored binders. If a party's exhibits cannot be easily placed in one book, then separate volumes of binders should be prepared.

3.2.4. The contents of each binder shall be labeled on its spine.

3.2.5. Each party shall provide the courtroom clerk with sufficient copies of each of its disputed exhibits for all jurors, plus three. These copies shall be three-hole punched, grouped by exhibit number and placed in separate files so that if the exhibit is admitted during trial, the courtroom clerk can readily provide each juror with a copy.

3.3. Juror Notebooks:

3.3.1. Include ONLY stipulated exhibits.

3.3.2. DO NOT include exhibit list.

3.3.3. Place one dozen blank sheets of notebook paper in each notebook.

3.3.4. Include all tab dividers in sequential order so that any later admitted exhibit may be readily placed within the juror's notebook.

3.4. Depositions: The original of all depositions you intend to use shall be delivered to the courtroom clerk at the beginning of trial. All deposition testimony shall be designated as provided in § 2.3.4. and two copies thereof provided to the courtroom clerk by the morning of the first day of trial. In jury trials, you should provide a person to read the answers. In trials to the court, the depositions will not be read in court. Do not

mark depositions as exhibits.

3.5. Videotape Depositions: If video depositions will be used, the parties should obtain rulings on any objections in sufficient time to permit the editing of the videotape to remove all non-designated and/or objectionable testimony, together with the objection. If such editing cannot be timely accomplished, then the written transcript will be used.

3.6. Special Equipment: Beyond easels, the court has virtually no special equipment. Accordingly, you must provide any special equipment and allow any other party the right to use it. You should coordinate those efforts with the courtroom clerk.

3.7. Terminology: Provide the courtroom clerk with three copies of a glossary of any unusual or technical terminology.

3.8. Written Resumes: In a trial to the court, a resume or curriculum vitae, marked as an exhibit, will usually suffice for qualification of an expert witness.

4. EXHIBIT LIST FORM

Judge Walker D. Miller

[Party] EXHIBIT LIST CASE NUMBER _____

CASE CAPTION _____ v. _____ PAGE NO. ___

List Plaintiff's Exhibits by Number (1, 2, 3, etc.) and Defendant's Exhibits by capital A followed by number (A1, A2, A3, etc.) *See* D.C.COLO.LCivR 56.1C.1.

Designation	Description	Offer	Stip.	In	Out	Rul. Res.	Comment

5. WITNESS LIST FORM

Judge Walker D. Miller

Case No. _____ Date:_____

Case
Caption:_____v._____

Plaintiff/Defendant Witness List

Will Call Witnesses (name & summary of testimony)	Estimated Time for Examination Direct	Cross
1. _____	_____	_____
_____	_____	_____
_____	_____	_____
2. _____	_____	_____
_____	_____	_____

etc.

May Call Witnesses (name & summary of testimony)	Estimated Time for Examination Direct	Cross
1. _____	_____	_____
_____	_____	_____
_____	_____	_____
2. _____	_____	_____
_____	_____	_____

etc.

6. MOTION FOR SUMMARY JUDGMENT

Any motion for summary judgment shall be filed in accordance with Fed. R. Civ. P. 56, D.C.COLO.LCivR 56.1 and these procedures:

6.1. Length of Briefs: The opening brief and answer brief shall not exceed 20 pages. The reply brief shall not exceed 10 pages. Upon appropriate motion, permission to file a brief of greater length may be granted in cases of extraordinary complexity.

6.2. Factual Matters in Movant's Brief: At or near the beginning of its brief, the movant shall include a "Statement of Undisputed Material Facts" which shall consist of separately numbered paragraphs containing a singular material fact which the movant believes to be undisputed. To the extent practicable, the paragraphs should be placed in chronological order. Each paragraph must include specific reference to record material that establishes the fact. A general reference to pleadings, depositions or other documents is not sufficient if the document is over one page in length. Otherwise, "specific reference" means:

6.2.1. In the case of any document filed with the court, the title of the document, the date filed or served, and the specific paragraph or page and line number;

6.2.2. In the case of interrogatories or requests for admissions, provide a copy of the interrogatory request and the response;

6.2.3. In the case of depositions, provide a copy of the page(s) establishing the fact, always including the complete question and response; and

6.2.4. In the case of any other type of material, a reference that will enable the court to quickly ascertain the stated fact without review of the entire document.

A general reference will not be sufficient unless the nature of a material fact does not permit specific reference (e.g. "the contract contains no provision for termination").

6.3. Response Brief: The brief in opposition shall include a section entitled "Response to Statement of Undisputed Material Facts" in which the movant's asserted undisputed material facts shall be admitted or denied in the same numbered paragraphs used by movant. Any denial shall include a brief factual explanation of the reasons with specific reference to material in the record supporting the denial. If the party opposing the motion believes there are additional disputed or undisputed material facts, its brief shall include a section entitled "Statement of Additional Disputed or Undisputed Material Facts," setting forth each in numbered, sequential paragraphs with specific references to the record.

6.4. Reply Brief: A reply brief shall include, if applicable, a section entitled "Reply concerning Additional Disputed or Undisputed Facts" in which the movant shall admit or deny each such fact and support any denial in the same fashion as provided above.

6.5. Exhibits: All exhibits filed shall be marked as provided in D.C.COLO.LCivR 56.1C. If there are more than 3 exhibits, they shall be divided by tab dividers or individually tabbed on the right side of the exhibit's first sheet with the tab bearing the exhibit mark.

6.6. General Observations: A summary judgment motion is not a necessary exercise of every case. I encourage realistic assessment, before filing, whether your case is appropriate for a full or partial summary judgment. That assessment should certainly include consideration of whether the matter is susceptible to a fairly clear factual restatement in the context of the applicable law. Any motion premised upon a significant number of facts being beyond genuine dispute is less likely to be successful.

7. MOTION FOR ATTORNEY'S FEES

When filing a motion for attorney's fees pursuant to D.C.COLO.LCivR 54.3, the movant shall attach an affidavit of an independent attorney (not representing any party in the litigation) concerning the reasonableness of the hourly rates and hours claimed by the movant.

8.1. FORM NATURE OF CASE INSTRUCTION (CIVIL)

INSTRUCTION NO. 1

Members of the jury, we are about to begin the trial of this case. Before the trial begins, however, there are certain instructions you should have to better understand what will be presented to you and how you should conduct yourselves during the trial.

The party who brings a lawsuit is called plaintiff. In this action the plaintiff(s) is/are _____. The party against whom the suit is brought is called defendant. In this action the defendant(s) is/are _____.

The plaintiff(s) seeks/seek damages [injunction, etc.] for what he/she/it alleges to be _____.

The defendant(s) deny/denies any wrongdoing and claims that:

8.2. FORM ELEMENTS OF CLAIM INSTRUCTION (CIVIL)

INSTRUCTION NO. 2

In order for plaintiff(s) to establish his/her/its/their claim of _____, he/she/it/they has/have the burden of proving the following essential elements by a preponderance of the evidence:

1.

2. (etc.)

If you find that plaintiff(s) has/have failed to prove any of those [number] elements by a preponderance of the evidence, then your verdict must be for defendant(s), as to the claim of _____.

If, on the other hand, you find that plaintiff(s) has/have proved the [number] elements by a preponderance of the evidence, then your verdict must be for plaintiff(s) on this claim, unless defendant(s) proves/prove _____, in which event your verdict on this claim must be for defendant(s).

8.3. FORM STIPULATED FACTS INSTRUCTION (CIVIL)

INSTRUCTION NO. 3

The parties to this lawsuit have agreed to certain facts which you must treat as having been proved. Those facts are:

1.

2. (etc.)

8.4. FORM JURY DUTIES, ETC. INSTRUCTION (CIVIL)

INSTRUCTION NO. 4

Now, I will give you some preliminary instructions to guide you in your participation in the trial.

Duty of Jury

It will be your duty to find from the evidence what the facts are. You, and you alone, are the judges of the facts. You will then have to apply to those facts the law as I, the court, will give it to you. You must follow that law whether you agree with it or not.

Nothing I may say or do during the course of the trial is intended to indicate, or should be taken by you as indicating, what your verdict should be.

Evidence

The evidence from which you will find the facts will consist of the testimony of witnesses, documents and other things received into the record as exhibits, and any facts the lawyers agree or stipulate to, or that I may instruct you to find.

Certain things are not evidence and must not be considered by you. I will list them for you now:

1. Statements, arguments, and questions by lawyers are not evidence.

2. Objections to questions are not evidence. Lawyers have an obligation to their clients to make an objection when they believe evidence being offered is improper under the rules of evidence. You should not be influenced by the objection or by my ruling on it. If the objection is sustained, ignore the question. If it is overruled, treat the

answer like any other. If you are instructed that some item of evidence is received for a limited purpose only, you must follow that instruction.

3. Testimony that I have excluded or told you to disregard is not evidence and must not be considered.

4. Anything you may have seen or heard outside the courtroom is not evidence and must be disregarded. You are to decide the case solely on the evidence presented here in the courtroom.

There are two kinds of evidence: direct and circumstantial. Direct evidence is direct proof of a fact, such as testimony of an eyewitness. Circumstantial evidence is proof of facts from which you may infer or conclude that other facts exist. I will give you further instructions on these as well as other matters at the end of the case, but have in mind that you may consider both kinds of evidence.

It will be up to you to decide which witnesses to believe, which witnesses not to believe, and how much of any witness's testimony to accept or reject. I will give you some guidelines for determining the credibility of witnesses at the end of the case.

Burden of Proof

This is a civil case. Except for [state any exception such as punitive damages], the plaintiff(s) has/have the burden of proving his/her/its case by what is called the preponderance of the evidence. That means the plaintiff(s) has/have to produce evidence which, considered in the light of all the facts, leads you to believe that what plaintiff(s) claims/claim is more likely true than not. To put it differently, if you were to put plaintiff's(s') and defendant's(s') evidence on opposite sides of the scales, plaintiff(s) would have to make the scales tip somewhat on his/her/its/their side. If

plaintiff(s) fails/fail to meet this burden, the verdict must be for defendant(s).

Those of you who have sat on criminal cases will have heard of proof beyond a reasonable doubt. That requirement does not apply to a civil case, and you should therefore put it out of your mind.

Conduct by the Jury

Now, a few words about your conduct as jurors.

First, I instruct you that during the trial you are not to discuss the case with anyone, including yourselves and your families, or permit anyone to discuss it with you. Until you retire to the jury room at the end of the case to deliberate on your verdict, you simply are not to talk about this case.

Second, do not read or listen to anything touching on this case in any way. If anyone should try to talk to you about it, bring it to my attention promptly.

Third, do not try to do any research or make any investigation about the case on your own.

Finally, do not form any opinion until all the evidence is in. Keep an open mind until you start your deliberation at the end of the case.

If you wish, you may take notes to help your recollection. If you do, leave them in the jury room when you leave at night. And remember that they are for your own personal use--they are not to be given or read to anyone else.

Course of the Trial

The trial will now begin. First, each side may make an opening statement. An opening statement is neither evidence nor argument; it is an outline of what that party intends to prove, offered to help you follow the evidence.

Next, plaintiff(s)will present his/her/its/their witnesses, and defendant(s) may cross-examine them. Then defendant(s) will present his/her/its/their witnesses, and plaintiff(s) may cross-examine them. Plaintiff(s) then may have a final opportunity to present rebuttal evidence, again subject to the defendant's(s') cross examination.

After that, the attorneys will make their closing arguments to summarize and interpret the evidence for you. Those will be followed by further instructions on the law.

You will then retire to deliberate on your verdict.

9.1 FORM NATURE OF CASE INSTRUCTION (CRIMINAL)

INSTRUCTION NO. 1

Members of the jury:

Now that you have been sworn, we are about to begin the trial of this case. Before the trial begins, however, there are certain instructions you should have in order to better understand what will be presented to you and how you should conduct yourself during the trial.

This is a criminal trial to determine whether the defendant is guilty of the federal crime(s) with which he/she/it is charged. The party who brings this charges is called the plaintiff. In this federal action, the plaintiff is the United States of America, usually referred to as the government. The party charged with the crime(s) and against whom this action is brought is called the defendant. In this action the defendant is _____.

The indictment charges that on or about the dates as alleged in each individual count of the indictment, in the State and District of Colorado, the defendant, _____, (describe crime(s) alleged).

The defendant, _____, has entered a plea of not guilty to the indictment.

The government, therefore, assumes the responsibility of proving beyond a reasonable doubt each of the essential elements of the crime(s) charged.

9.2. FORM ELEMENTS OF CRIME INSTRUCTION (CRIMINAL)

INSTRUCTION NO. 2

In order to sustain its burden of proof for the crime of _____ as charged in the indictment, the government must prove each of the following [number] essential elements beyond a reasonable doubt:

1.

2. (etc.)

If the government fails to prove any of those [number] elements beyond a reasonable doubt, then your verdict must be not guilty.

9.3. FORM STIPULATED FACTS INSTRUCTION (CRIMINAL)

INSTRUCTION NO. 3

The parties have stipulated to certain facts, for purposes of this trial. When the attorneys on both sides stipulate or agree as to the existence of a fact, you may accept the stipulation as evidence and regard the fact as proved. You are not required to do so, however, since you are the sole judge of the facts.

The stipulated facts are:

1.

2. (etc.)

9.4. FORM JURY DUTIES, ETC. INSTRUCTION (CRIMINAL)

INSTRUCTION NO. 4

Now I will give you some preliminary instructions to guide you in your participation in the trial.

Duty of Jury

It will be your duty to find from the evidence what the facts are. You, and you alone, are the judges of the facts. You will then have to apply to those facts the law as I, the court, will give it to you. You must follow that law whether you agree with it or not.

Nothing I may say or do during the course of the trial is intended to indicate, or should be taken by you as indicating, what your verdict should be.

Evidence

The evidence from which you will find the facts will consist of the testimony of witnesses, documents and other things received into the record as exhibits, and any facts the lawyers agree or stipulate to, or that I may instruct you to find.

Certain things are not evidence and must not be considered by you. I will list them for you now:

1. Statements, arguments, and questions by lawyers are not evidence.

2. Objections to questions are not evidence. Lawyers have an obligation to their clients to make an objection when they believe evidence being offered is improper under the rules of evidence. You should not be influenced by the objection or by my ruling on it. If the objection is sustained, ignore the question. If it is overruled, treat the

answer like any other. If you are instructed that some item of evidence is received for a limited purpose only, you must follow that instruction.

3. Testimony that I have excluded or told you to disregard is not evidence and must not be considered.

4. Anything you may have seen or heard outside the courtroom is not evidence and must be disregarded. You are to decide the case solely on the evidence presented here in the courtroom.

There are two kinds of evidence: direct and circumstantial. Direct evidence is direct proof of a fact, such as testimony of an eyewitness. Circumstantial evidence is proof of facts from which you may infer or conclude that other facts exist. I will give you further instructions on these as well as other matters at the end of the case, but have in mind that you may consider both kinds of evidence.

It will be up to you to decide which witnesses to believe, which witnesses not to believe, and how much of any witness's testimony to accept or reject. I will give you some guidelines for determining the credibility of witnesses at the end of the case.

Rules for Criminal Cases

There are three basic rules about a criminal case that you must keep in mind.

First, the defendant is presumed innocent until proven guilty. The indictment [information] against the defendant is only an accusation, nothing more. It is not proof of guilt or anything else. The defendant starts out with a clean slate.

Second, the burden of proof is on the government throughout the case. The defendant has no burden to prove his or her innocence, or to present any evidence, or to testify. The defendant has the absolute right to remain silent. You are prohibited

from arriving at your verdict by considering that the defendant may not have testified.

Third, the government must prove the defendant's guilt beyond a reasonable doubt. I will give you further instructions on these points later, but keep in mind that a criminal case is different from a civil case which only requires proof by a preponderance of the evidence.

Conduct by the Jury

Now, a few words about your conduct as jurors.

First, I instruct you that during the trial you are not to discuss the case with anyone, including yourselves and your families, or permit anyone to discuss it with you. Until you retire to the jury room at the end of the case to deliberate on your verdict, you simply are not to talk about this case.

Second, do not read or listen to anything touching on this case in any way. If anyone should try to talk to you about it, bring it to my attention promptly.

Third, do not try to do any research or make any investigation about the case on your own.

Finally, do not form any opinion until all the evidence is in. Keep an open mind until you start your deliberation at the end of the case.

If you wish, you may take notes to help your recollection. If you do, leave them in the jury room when you leave at night. And remember that they are for your own personal use--they are not to be given or read to anyone else.

Course of the Trial

The trial will now begin. First, the government will make an opening statement. An opening statement is neither evidence nor argument; it is an outline of what that

party intends to prove, offered to help you follow the evidence. The defendant's attorney may, but does not have to, also make an opening statement.

The government will then present its witnesses, and defendant may cross-examine them. Next defendant may, if he/she/it wishes, present his/her/its witnesses, and the government may cross-examine them. Then the government may have a final opportunity to present some rebuttal evidence, again subject to the defendant's cross examination.

After that, the attorneys will make their closing arguments to summarize and interpret the evidence for you. Those will be followed by further instructions on the law.

You will then retire to deliberate on your verdict.

10.1. FORM DUTIES OF JURY INSTRUCTION (ALL CASES)

INSTRUCTION NO. ____

MEMBERS OF THE JURY:

Now that you have heard the evidence (and the argument), it becomes my duty to further instruct you concerning the law governing this case in addition to the introductory instructions. It is your duty as jurors to follow the law as I state it to you. You will then apply that law to the facts as you find them from the evidence in the case. You are not to single out one instruction alone as stating the law, but must consider the instructions as a whole.

You are not to be concerned with the wisdom of any rule of law stated by me. It would be a violation of the oath which you have sworn as jurors to base your verdict on anything other than the law as presented in these instructions and the facts as you find them. Counsel may properly refer to some of the governing rules of law in their arguments. If, however, there is any difference between the law as stated by counsel and that stated by me in these instructions, you are governed by my instructions.

As members of the jury, you are the sole and exclusive judges of the facts. You pass upon the evidence. You determine what witnesses and what evidence to believe. You resolve conflicts in the testimony. Nothing I say in these instructions is to be taken as an indication that I have any opinion about the facts of the case, or what that opinion is. It is not my function to determine the facts; it is yours.

You must perform your duties as jurors without bias or prejudice as to any party. The law does not permit you to be governed by sympathy, prejudice, or public opinion. The court and the parties expect that you will carefully and impartially consider all of evidence, follow the law as it is now being given to you, and reach a just verdict, regardless of the consequences.

10.2. FORM JURY COMMUNICATION INSTRUCTION (ALL CASES)

INSTRUCTION NO. ____

I do not invite communications from you, but if it becomes necessary during your deliberations to communicate with the court, you may send a note by the court security officer, signed by your foreperson or by one or more members of the jury. No member of the jury should ever attempt to communicate with the court by any means other than a signed writing, and the court will never communicate with any member of the jury on any subject touching the merits of the case other than in writing, or orally here in open court. Upon receipt of a note from you, I will need to convene a meeting with counsel to discuss your question or request. It may well take considerable time and effort to respond.

You will note from the oath about to be taken by the court security officer that he or she, as well as all other persons, are forbidden to communicate in any way or manner with any member of the jury on any subject touching the merits of the case. Let me know immediately if anyone attempts any such communication.

Bear in mind also that you are never to reveal to any person--not even to the court--how the jury stands, numerically or otherwise, on the questions before you, until after you have reached a unanimous verdict.

10.3. FORM CREDIBILITY OF WITNESSES INSTRUCTION (ALL CASES)

INSTRUCTION NO. _____

You are the sole judges of the credibility of the witnesses and the weight to be given their testimony. You should take into consideration their means of knowledge, strength of memory, and opportunities for observation; the reasonableness or unreasonableness of their testimony; the consistency or lack of consistency in their testimony; their motives; their intelligence; their ability to observe the matters about which they have testified; whether their testimony has been contradicted or supported by other evidence; their bias, prejudice, or interests, if any; their manner or demeanor upon the witness stand; and all other facts and circumstances shown by the evidence which affect the credibility of the witnesses.

Based on these considerations, you may believe all, part, or none of the testimony of a witness and you may give the testimony such weight, if any, as you think it deserves.

10.4. FORM RESOLUTION OF FACTUAL ISSUES INSTRUCTION (ALL CASES)

INSTRUCTION NO. _____

You should not resolve factual issues in the case solely by adding up the number of witnesses who testify on each side of a certain issue. If you believe the testimony of a single witness who testifies about a disputed event, such testimony is enough for you to resolve the factual dispute in accordance with this single witness's version of the event, even though a number of witnesses may have testified to the contrary.

The test is not which side brings the greater number of witnesses, or presents the greater quantity of evidence; the test, rather, is which witness or witnesses, and which evidence, appeals to your minds as being most accurate, believable, and otherwise trustworthy.

10.5. FORM IMPEACHMENT INSTRUCTION (ALL CASES)

INSTRUCTION NO. ____

A witness may be discredited or impeached by contradictory evidence, or by evidence that at some other time the witness has said or done something, or has failed to say or do something, which is inconsistent with the witness's present testimony.

If you believe any witness has been impeached and thus discredited, it is your exclusive province to give the testimony of that witness such credibility, if any, as you may think it deserves.

If a witness is shown knowingly to have testified falsely concerning any material matter, you have a right to distrust such witness's testimony in other particulars and you may reject part or all of the testimony of that witness or give it such weight as you may think it deserves.

10.6. FORM EXPERT OPINION INSTRUCTION (ALL CASES)

INSTRUCTION NO. ___

Normally the law does not permit witnesses to testify as to their opinions or conclusions about the issues of the trial. An exception to this rule is a person who qualifies as an expert witness. A qualified expert witness has special knowledge, skill, training, education, or experience in some area and may give his or her opinion on matters in that area as well as the reasons for that opinion.

Expert testimony should be considered just like any other testimony. You may accept or reject it and give it such weight as you think it deserves, considering the witness's education and experience, soundness of reasons given for the opinion, the acceptability of the methods used, and all other evidence in the case.

10.7. FORM PRESUMPTION OF INNOCENCE, BURDEN OF PROOF, REASONABLE DOUBT AND PUNISHMENT (CRIMINAL)

INSTRUCTION NO. ___

You must presume defendant to be innocent of the crime charged. The law permits nothing but legal evidence presented before the jury in this court to be considered in support of the charge against the defendant. The presumption of innocence alone, therefore, is sufficient to acquit the defendant.

The burden is always upon the prosecution to prove guilt beyond a reasonable doubt. This burden never shifts to defendant for the law never imposes upon defendant the burden of calling any witnesses or producing any evidence. The defendant is not even obligated to cross-examine the witnesses for the government.

The government does not have to prove guilt beyond all possible doubt. The test is one of reasonable doubt. Reasonable doubt is a doubt based upon reason and common sense--the kind of doubt that would make a reasonable person hesitate to act**.** Proof beyond a reasonable doubt must, therefore, be proof of such a convincing character that a reasonable person would not hesitate to act upon it in the most important of his or her own affairs.

Unless the government proves, beyond a reasonable doubt, that defendant has committed each and every element of the offense charged against him/her/it you must find him/her/it not guilty. If you view the evidence as reasonably permitting either of two conclusions--one of not guilty, the other of guilt--you must, of course, adopt the conclusion of not guilty.

The punishment provided by law for the offense charged is a matter to be

decided exclusively by the court and should never be considered by you in any way in arriving at an impartial verdict.

10.8. FORM EFFECT OF DEFENDANT'S FAILURE TO TESTIFY (CRIMINAL)

INSTRUCTION NO. ____

The defendant in a criminal case has the absolute right under our Constitution not to testify. The fact that defendant did not testify must not be discussed or considered by you in any way when deliberating your verdict. No inference of any kind may be drawn from the fact that a defendant decided to exercise his privilege under the Constitution to not testify. I remind you that the law never imposes upon a defendant the burden or duty of calling any witnesses or producing any evidence.

10.9. FORM MEASURE OF DAMAGES INSTRUCTION (CIVIL)

INSTRUCTION NO. _____

I will now instruct you on the proper measure of damages, if any, to be recovered by plaintiff(s) should you find in his/her/its/their favor on one or more of his/her/its/their claims. The fact that I will instruct you on the proper measure of damages should not be considered as an indication of any view of mine as to which party is entitled to your verdict in this case. These instructions are given only for your guidance, in the event that you should find in favor of plaintiff(s) on the question of liability in accordance with the other instructions. If you should find for defendant(s), you should disregard these instructions on damages.

10.10. FORM DETERMINATION OF DAMAGES INSTRUCTION (CIVIL)

INSTRUCTION NO. _____

In determining the amount of any damages that you decide to award, you should be guided by dispassionate common sense. You must use sound discretion in fixing an award of damages, drawing reasonable inferences from the facts in evidence. You may not award damages based on sympathy, speculation, or guess work. On the other hand, the law does not require that the plaintiff(s) prove the amount of his/her/its/their losses with mathematical precision, but only with as much definiteness and accuracy as circumstances permit.

10.11. FORM UNANIMOUS VERDICT INSTRUCTION (ALL CASES)

INSTRUCTION NO. _____

The verdict must be unanimous and represent the considered judgment of each juror. To return a verdict, it is necessary that each juror agrees.

It is your duty, as jurors, to consult with one another, and to deliberate with a view to reaching an agreement, if you can do so without violence to individual judgment. You must each decide the case for yourself, but only after an impartial consideration of the evidence in the case with your fellow jurors. In the course of your deliberations, do not hesitate to reexamine your own views, and change your opinion, if convinced it is erroneous. But do not surrender your honest conviction as to the weight or effect of evidence, solely because of the opinion of your fellow jurors, or for the mere purpose of returning a verdict.

Remember at all times that you are not partisans. You are judges -- judges of the facts. Your sole interest is to seek the truth from the evidence in the case.

10.12. FORM FOREPERSON AND VERDICT INSTRUCTION (CIVIL)

INSTRUCTION NO. ____

Upon retiring to the jury room, you shall select one of your number to act as your foreperson. The foreperson will preside over your deliberations and be your spokesperson here in court. Verdict forms have been prepared for your convenience to take to the jury room.

You will note that the forms include a number of interrogatories or questions which call for a "yes" or "no" answer. The answer to each question must be the unanimous answer of the jury. Your foreperson will write the unanimous answer of the jury in the space provided for each response. As you will note from the wording of the questions, it may not be necessary to consider or answer every question.

When you have completed the verdict form, the foreperson will sign and date the form, which should be brought to the courtroom when you return.

10.13. FORM FOREPERSON AND VERDICT INSTRUCTION (CRIMINAL)

INSTRUCTION NO. ____

Upon retiring to the jury room, you shall select one of your number to act as your foreperson. The foreperson will preside over your deliberations and be your spokesperson here in court. A verdict form has been prepared for your convenience. Your foreperson will write the unanimous answer of the jury in the space provided. When you have completed the verdict form, the foreperson will sign and date the form, which should be brought to the courtroom when you return.

10.14. FORM ALLEN INSTRUCTION (CRIMINAL)

INSTRUCTION NO. _____

Members of the Jury, I ask that you continue your deliberations in an effort to agree on a verdict and dispose of this case, and I have a few additional comments I would like for you to consider as you do so.

First, this is an important case. The trial has been expensive in time, effort, and money to both the defense and the prosecution. If you should fail to agree on a verdict, the case is left open and may be tried again. Obviously another trial would only serve to increase the cost to both sides, and there is no reason to believe that the case could be tried again by either side better or more exhaustively than it has been tried before you. Any future jury must be selected in the same manner and from the same source as you were chosen, and there is no reason to believe that the case would go to jurors more conscientious, more impartial or more competent than you, or that more or clearer evidence could be produced.

If a substantial majority of your number are for a conviction, each dissenting juror ought to consider whether a doubt in his or her mind is a reasonable one, since it appears to make no effective impression on the minds of the others. On the other hand, if a majority or even a lessor number of you are for acquittal, the other jurors ought seriously to ask themselves again and most thoughtfully, whether they do not have a reasonable doubt, the correctness of a judgment which is not shared by several of their fellow jurors, and whether they should distrust the weight and sufficiency of the

evidence which failed to convince several of their fellow jurors beyond a reasonable doubt.

Remember at all times that no juror is expected to yield a conscientious conviction he or she may have as to the weight or effect of the evidence, but remember also that after full deliberation and consideration of the evidence in the case, it is your duty to agree on a verdict if you can do so without surrendering your conscientious conviction.

You must also remember if evidence in the case fails to establish guilt beyond a reasonable doubt, the accused should have your unanimous verdict of not guilty.

U.S. v. Butler, 904 F.2d 1482 (10th Cir. 1990)

U.S. v. Rodriguez-Mejia, No. 93-2182 (10th Cir. April 1, 1994)

U.S. v. Reed, 61 F.3d 803 (10th Cir. 1995)